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No. 92-690

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner,

vs.

LAWRENCE J. ANGLIM,
Respondent.

On Petition for a Writ of Certiorari to
The Supreme Court of Missouri

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Respondent's principal argument in opposition to the Petition is that petitioner supposedly did not timely raise the question presented in the trial court. Regardless of whether the claim was timely as a matter of state law,[1] the fact remains that the Supreme

[1] In order to preserve error as to the sufficiency of the evidence, Missouri courts require that the issue be raised either in a motion for directed verdict or in post-trial motions for judgment notwithstanding the verdict and new trial. *E.g.*, *Black v. Cowan Const. Co.*, 738 S.W.2d 617, 621 (Mo. App. 1987). The issue was raised in the trial court in petitioner's post-trial motions, which were denied. *See* Petition, p. 6.

Court of Missouri actually considered and decided the question of whether a plaintiff in an action under the Federal Employers Liability Act ("FELA"), 45 U.S.C. §51 *et seq.*, must offer any evidence of the present value of his lost future wages in order to meet his burden of making a submissible case on the issue. In ruling that a FELA plaintiff need not offer such proof, the Missouri Supreme Court held:

> Of more substance is defendant's argument that, since a present value instruction is required in FELA cases, evidence of the manner of computing present value is an essential element of an FELA plaintiff's burden of proof. Defendant relies upon two decisions of the United States Court of Appeals, 3rd Circuit, which so hold. *DiSabatino v. National Railroad Passenger Corp.*, 724 F.2d 394, 396 (3rd Cir. 1984); *Ballantine v. Central Railroad of New Jersey*, 460 F.2d 540, 544 (3rd Cir.) *cert. denied*, 409 U.S. 879 (1972). Defendant acknowledges the 8th Circuit has reached a contrary conclusion. *Duncan v. St. Louis San Francisco R.R. Co.*, 480 F.2d 79, 87 (8th Cir.), *cert. denied*, 414 U.S. 859 (1972).
>
> While no Missouri case has specifically addressed the point, Missouri appears to follow the rule laid down by the 8th Circuit [citing *Bair v. St. Louis San Francisco Ry. Co.*, 647 S.W.2d 507 (Mo. banc), *cert. denied* 464 U.S. 830 (1983)].
>
> * * *
>
> Therefore, we do not run afoul of the federal law by following *Bair* in holding that either plaintiff or defendant may offer present value evidence, but whether or not such evidence is offered, the subject is open to jury instruction if requested and to jury argument.... The sum included within the general verdict as compensation for future loss of wages is a matter forever relegated to the bosom of the jury.

> In the absence of any contrary indication, we can assume each juror in his or her respective fashion complied with the instruction and determined the present value of future wage loss.

App. A at A-17-18.

When a state court actually decides a question of federal law, the objection that it was not timely raised in the courts below is without force. *Orr v. Orr*, 440 U.S. 268, 274-275 (1979). This is merely an application of the "elementary rule that it is irrelevant to inquire . . . when a Federal question was raised in a court below when it appears that such question was actually considered and decided." *Manhattan Life Ins. Co. v. Cohen*, 234 U.S. 123, 134 (1914). As the Court has consistently held, "There can be no question as to the proper presentation of a federal claim when the highest state court passes on it." *Raley v. Ohio*, 360 U.S. 423, 436 (1959). *See also* C. Wright, *Law of Federal Courts*, §107, p. 745 (4th ed. 1983).

Respondent also questions whether a conflict exists between the decisions of the Third Circuit in *Ballantine* and *DiSabatino* and the decision of the Supreme Court of Missouri. Even putting aside the conclusion of the Missouri Supreme Court below that such a conflict indeed exists, *see* App. A. at A-17, respondent's efforts to distinguish the Third Circuit decisions are unavailing.

Respondent claims that *Ballantine* focused on an inadequate jury instruction which failed to give the jury guidance as to the reduction of the plaintiff's future lost wages to present value. Respondent has clearly misread the opinion and ignored its relevant parts. First, the jury instruction given by the *Ballantine* trial court was more detailed in its explanation of the concept of present value than the one given by the trial court in this case.[2]

[2] The jury instruction given by the trial court on present value is quoted at p. 4 of the Petition. The instruction given by the *Ballantine* court is quoted in 460 F.2d at 542 *n.* 5.

Second, the instruction given by the *Ballantine* trial court specifically stated that the process described is that "which is involved when you come to an award and award lost earnings in the future." 460 F.2d at 542 *n.* 5.

Respondent's suggestion that *Ballantine* turned on a jury instructional issue simply is not borne out by the opinion. The critical paragraph in the opinion is found at page 544 where the court stated:

> The record in this case . . . contains evidence of lost future earnings. The parties stipulated the retirement age from the railroad. Evidence was offered to show an annual diminution of earnings by $6,250.00. Plaintiff closed to the jury on this issue by multiplying the number of years of plaintiff's work expectancy with Central by the annual loss of earnings figure, arriving at a gross figure of $143,750. No other evidence was introduced on the method of reducing lost prospective earnings to present value. Under these circumstances, the award of damages cannot stand. *We hold that once evidence is presented and recovery is sought for future lost earnings, the jury is entitled to receive evidence and appropriate mathematical guidance on the method of reducing lost future earnings to present worth, if they are to act rationally and 'not upon mere conjecture and guess.'*

460 F.2d at 544 (emphasis added).

This description of the record in *Ballantine* is identical to that in the Missouri trial court below. Obviously, the Third Circuit and the Missouri Supreme Court differ over the significance of the plaintiff's failure to offer evidence of the measure of his damages for lost future wages.

DiSabatino stands for exactly the same proposition as *Ballantine*, *i.e.*, that plaintiff has the burden of offering evidence of the present value of his lost future wages. The only wrinkle

in *DiSabatino* that was not present in *Ballantine* was that at the time it was tried the Third Circuit's decision in *Pfeifer v. Jones & Laughlin Steel Corp.*, 678 F.2d 453 (3rd Cir. 1982) was then before this Court on a petition for a writ of certiorari. After the jury verdict in *DiSabatino*, this Court reversed the *Pfeifer* decision. *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983). The plaintiff chose not to offer evidence of the present value of his lost future wages and successfully opposed a jury instruction on the issue. The Third Circuit in *DiSabatino* reaffirmed the proposition that "the burden of producing evidence [of the present value of the plaintiff's lost future wages] rested with the plaintiff." *DiSabatino*, 724 F.2d at 395, *citing Ballantine, Russell v. City of Wildwood*, 428 F.2d 1176, 1180 (3rd Cir. 1970) and *Haddigan v. Harkins*, 441 F.2d 844, 853 (3d Cir. 1970).

Respondent confuses the question of whether an instruction on reducing the plaintiff's future lost wages to present value should be given (which is not raised in the petition) with the question of whether the plaintiff has the burden of proving the present value of his lost future wages (the issue raised in the petition). Plaintiff argues that in the absence of any evidence by either party, it is proper to submit the issue on a general instruction of the type refused by the trial court in *St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409 (1985), relying on the concurring opinion of Judge Phillips in *Aldridge v. Baltimore & Ohio R. Co.*, 814 F.2d 157 (4th Cir. 1987). Whether Judge Phillips' concurring opinion or whether Judge Chapman's dissenting opinion in the same case was correct begs the very question petitioner asks this Court to resolve.

Respondent criticizes the sample present value calculation contained in the Petition on the grounds it has no support in the record. Petition, pp. 12 *n.* 1, 22 *n.* 4. Of course, neither party offered any evidence of how to calculate present value. The calculation of present value in footnotes 1 and 4 of the Petition were examples of mathematical computations of present value

based upon cases such as *Doca v. Marina Mercanti Nicaraguense, S.A.*, 634 F.2d 30 (2d Cir. 1980) *cert. denied* 451 U.S. 971 (1981) which suggested an historical "real interest rate" of 2%.

Respondent further criticizes the "real interest rate" used in the example in the Petition because it "conveniently leave[s] out the effects of inflation and wage increases." Brief in Opp. at p. 15. As noted in *Doca*, the "real interest rate" accounts for precisely these factors. 634 F.2d at 36-40. If counsel for the plaintiff in this action, who have many years of experience in representing railroad workers in FELA cases, do not understand the concept of real interest rates, than how can they argue that a jury of laymen would intuitively figure it out for themselves in absence of any evidence?

Respondent also cautions against requiring the admission of evidence of present value on the grounds that it might cause the trial to degenerate into a "graduate economics seminar." Brief in Opp. at p. 15. This fear is overstated. Every personal injury suit under the FELA already requires the plaintiff to produce medical evidence of the plaintiff's injury and its causation by the accident in question. Yet, no one has ever expressed a fear that personal injury trials may degenerate into "graduate medical seminars" even though doctors routinely are called to testify about injuries to various parts of the plaintiff's body.

The sample cross-examination proffered by the respondent, Brief in Opp. at pp. 15-16, is hardly indicative of a major trial management problem. Indeed, the jury may well follow the testimony of economists about discounting future wages to present value with the same degree of ease or difficulty as they follow a doctor's testimony about the details of CAT scans or magnetic resonance imaging tests of lumbar discs at the L5-S1 level, which are a routine feature of such trials. The courts have had no difficulty in dealing with present value evidence when it is offered. *See, e.g. Sampson v. Missouri Pacific R. Co.*, 560 S.W.2d 573, 587-589 (Mo. banc 1978).

Finally, respondent claims prejudice from a so-called "appeal by ambush" because it might have chosen to present additional evidence or try to reach certain stipulations had the argument been raised earlier. This is self-serving nonsense. The record establishes that respondent objected to the giving of the present value jury instruction because *petitioner* offered no such evidence. Tr. IV-459; Petition, p. 4. Under Missouri precedent as it then existed and as it stands now, an FELA plaintiff has no responsibility to present any evidence on the issue of the present value of his claimed lost future wages. The question of whether this is a correct legal position under the FELA is the issue raised by the Petition.

CONCLUSION

Petitioner claims that the plaintiff's burden of proof under the FELA is to offer evidence of his damages, including the present value of lost future wages. Respondent claims that he has no such burden and that the jurors may calculate such damages "in his or her respective fashion" with no evidentiary basis. The courts below, as detailed in the Petition, differ on the question. The issue is a recurrent one which should be resolved by this Court. Petitioner respectfully requests the Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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